

HOUSE BILL No. 1247

DIGEST OF INTRODUCED BILL

Citations Affected: IC 24-3-5.4.

Synopsis: Nonparticipating tobacco manufacturers. Requires: (1) newly qualified nonparticipating tobacco product manufacturers; and (2) nonparticipating tobacco product manufacturers that the attorney general determines pose an elevated risk of noncompliance with tobacco product regulations; to post a surety bond. Requires a person that imports cigarette brand families of a nonparticipating manufacturer to assume joint and several liability with the nonparticipating manufacturer for qualified escrow payments and associated penalties, costs, and fees.

Effective: July 1, 2010.

Pearson, Crawford

January 12, 2010, read first time and referred to Committee on Public Policy.

C
o
p
y



Second Regular Session 116th General Assembly (2010)

PRINTING CODE. Amendments: Whenever an existing statute (or a section of the Indiana Constitution) is being amended, the text of the existing provision will appear in this style type, additions will appear in **this style type**, and deletions will appear in ~~this style type~~.

Additions: Whenever a new statutory provision is being enacted (or a new constitutional provision adopted), the text of the new provision will appear in **this style type**. Also, the word **NEW** will appear in that style type in the introductory clause of each SECTION that adds a new provision to the Indiana Code or the Indiana Constitution.

Conflict reconciliation: Text in a statute in *this style type* or ~~this style type~~ reconciles conflicts between statutes enacted by the 2009 Regular and Special Sessions of the General Assembly.

HOUSE BILL No. 1247

A BILL FOR AN ACT to amend the Indiana Code concerning trade regulation.

Be it enacted by the General Assembly of the State of Indiana:

1 SECTION 1. IC 24-3-5.4-5.5 IS ADDED TO THE INDIANA
2 CODE AS A **NEW** SECTION TO READ AS FOLLOWS
3 [EFFECTIVE JULY 1, 2010]: **Sec. 5.5. As used in this chapter,**
4 **"importer" means a person that imports, other than for personal**
5 **consumption, one (1) or more brand families of a nonparticipating**
6 **manufacturer.**

7 SECTION 2. IC 24-3-5.4-6.5 IS ADDED TO THE INDIANA
8 CODE AS A **NEW** SECTION TO READ AS FOLLOWS
9 [EFFECTIVE JULY 1, 2010]: **Sec. 6.5. As used in this chapter,**
10 **"newly qualified nonparticipating manufacturer" means a**
11 **nonparticipating manufacturer:**

12 (1) **that has filed a certification under section 13 of this**
13 **chapter; and**
14 (2) **whose brand families are not listed in a directory under**
15 **section 14 of this chapter.**

16 SECTION 3. IC 24-3-5.4-13 IS AMENDED TO READ AS
17 FOLLOWS [EFFECTIVE JULY 1, 2010]: **Sec. 13. (a)** Not later than



C
o
p
y

April 30 of each year, a tobacco product manufacturer whose cigarettes are sold in Indiana, whether directly or through a distributor, retailer, or similar intermediary, shall certify to the department and the attorney general that, as of the date of the certification, the tobacco product manufacturer is:

- (1) a participating manufacturer; or
- (2) in full compliance with IC 24-3-3.

The department shall prescribe the form of the certification.

(b) A participating manufacturer shall include in a certification under subsection (a) a list of the participating manufacturer's brand families. The participating manufacturer shall update the list by filing a supplemental certification with the department and the attorney general not less than thirty (30) days before the participating manufacturer adds a brand family or otherwise modifies the list of brand families.

(c) A nonparticipating manufacturer shall include in a certification under subsection (a) a list of the nonparticipating manufacturer's brand families, including the following:

- (1) A separate listing of each brand family that was sold in Indiana during the calendar year before the year in which the certification is filed.
- (2) A separate listing of the number of units sold for each brand family that was sold in Indiana during the calendar year before the year in which the certification is filed.
- (3) An indication of any brand family that was sold in Indiana during the calendar year before the year in which the certification is filed and that is not sold in Indiana as of the date of the certification.
- (4) The name and address of any other manufacturer of a brand family that was sold in Indiana during the calendar year before the year in which the certification is filed.

(d) A nonparticipating manufacturer shall file a supplemental certification with the attorney general not less than thirty (30) days before the nonparticipating manufacturer adds to or otherwise modifies its list of brand families.

(e) A nonparticipating manufacturer shall certify the following in a certification under subsection (a):

- (1) The nonparticipating manufacturer:
 - (A) is registered to do business in Indiana; or
 - (B) has appointed an agent for service of process and provided notice under section 16 of this chapter.
- (2) The nonparticipating manufacturer has:

C
O
P
Y



- 1 (A) established and continues to maintain a qualified escrow
- 2 fund; and
- 3 (B) executed a qualified escrow agreement that:
 - 4 (i) the attorney general has approved; and
 - 5 (ii) governs the qualified escrow fund.
- 6 (3) The nonparticipating manufacturer is in full compliance with:
 - 7 (A) this section; ~~and~~
 - 8 **(B) section 13.5 of this chapter, if applicable;**
 - 9 **(C) section 13.6 of this chapter, if applicable; and**
 - 10 ~~(B)~~ **(D) IC 24-3-3.**
- 11 (4) The name, address, and telephone number of the financial
- 12 institution that holds the nonparticipating manufacturer's qualified
- 13 escrow fund.
- 14 (5) The account number and any subaccount numbers of the
- 15 nonparticipating manufacturer's qualified escrow fund.
- 16 (6) The amounts and dates of deposits that the nonparticipating
- 17 manufacturer placed in the qualified escrow fund for cigarettes
- 18 sold in Indiana during the calendar year before the year in which
- 19 the certification is filed, including any verification required by the
- 20 attorney general.
- 21 (7) The amounts and dates of withdrawals or transfers of funds
- 22 that the nonparticipating manufacturer made from a qualified
- 23 escrow fund into which the nonparticipating manufacturer made
- 24 or makes escrow payments under IC 24-3-3.
- 25 (f) A tobacco product manufacturer shall not include a brand family
- 26 in the tobacco product manufacturer's certification under subsection (a)
- 27 unless:
 - 28 (1) in the case of a participating manufacturer, the participating
 - 29 manufacturer affirms that the brand family is considered the
 - 30 participating manufacturer's cigarettes for purposes of calculating
 - 31 the participating manufacturer's payments under the master
 - 32 settlement agreement for the year in which the certification is
 - 33 filed in the volume and shares determined under the master
 - 34 settlement agreement; or
 - 35 (2) in the case of a nonparticipating manufacturer, the
 - 36 nonparticipating manufacturer affirms that the brand family is
 - 37 considered to be the nonparticipating manufacturer's cigarettes for
 - 38 purposes of IC 24-3-3-12(2).
- 39 (g) This section does not limit or otherwise affect the state's right to
- 40 maintain that a brand family constitutes cigarettes of a different
- 41 tobacco product manufacturer for purposes of calculating payments
- 42 under the master settlement agreement or for purposes of IC 24-3-3.

C
o
p
y



(h) A nonparticipating manufacturer shall maintain all invoices and documentation of sales and any other relevant information for a period of five (5) years unless otherwise required by law to maintain the invoices, documentation of sales, or other relevant information for more than five (5) years.

SECTION 4. IC 24-3-5.4-13.5 IS ADDED TO THE INDIANA CODE AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2010]: **Sec. 13.5. (a) This section applies to a nonparticipating manufacturer whose principal place of business is located outside the United States.**

(b) Each year, a nonparticipating manufacturer shall provide to the attorney general a declaration from each of the nonparticipating manufacturer's importers that does the following:

(1) States that the importer assumes joint and several liability with the nonparticipating manufacturer for the following payments, penalties, costs, and fees with respect to the importer:

(A) Any escrow payments required under IC 24-3-3-12(2) for deposit in a qualified escrow fund.

(B) Any penalties assessed against the nonparticipating manufacturer under IC 24-3-3 or this chapter.

(C) Payment of all costs and fees recovered by the state against the nonparticipating manufacturer under section 28 of this chapter.

(2) Appoints a registered agent for service of process for the importer and provides notice in accordance with section 16 of this chapter.

The attorney general shall prescribe the form of a declaration under this subsection, including dates for filing the declaration.

SECTION 5. IC 24-3-5.4-13.6 IS ADDED TO THE INDIANA CODE AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2010]: **Sec. 13.6. (a) The attorney general may determine that a nonparticipating manufacturer, including a newly qualified nonparticipating manufacturer, poses an elevated risk for noncompliance with this article if any of the following applies:**

(1) The nonparticipating manufacturer or an affiliate of a nonparticipating manufacturer has failed to make required payments into a qualified escrow fund in any state during the three (3) calendar years immediately preceding the date of the determination unless:

(A) the nonparticipating manufacturer or affiliate:

**C
o
p
y**



- 1 (i) did not knowingly or recklessly fail to make the
- 2 required payments; and
- 3 (ii) makes the required payment not more than one
- 4 hundred eighty (180) days after receiving notice of the
- 5 missed or insufficient payment; or
- 6 (B) the failure to make the required payment is:
- 7 (i) the subject of a good faith dispute that is documented
- 8 to the satisfaction of the attorney general; and
- 9 (ii) cured not more than one hundred eighty (180) days
- 10 after entry of a final order that resolves the good faith
- 11 dispute and establishes the amount of the required
- 12 escrow payment.
- 13 (2) A state has removed the nonparticipating manufacturer,
- 14 an affiliate of the nonparticipating manufacturer, or a brand
- 15 family of the nonparticipating manufacturer or an affiliate of
- 16 the nonparticipating manufacturer from the state's tobacco
- 17 directory for noncompliance with state law during the three
- 18 (3) calendar years immediately preceding the date of the
- 19 determination.
- 20 (3) A state has:
- 21 (A) litigation pending; or
- 22 (B) an unsatisfied judgment;
- 23 against the nonparticipating manufacturer or an affiliate of
- 24 the nonparticipating manufacturer for escrow payments or
- 25 penalties, costs, or fees related to the nonparticipating
- 26 manufacturer's or affiliate's noncompliance with the state's
- 27 escrow laws.
- 28 (b) The attorney general shall require:
- 29 (1) a newly qualified nonparticipating manufacturer; or
- 30 (2) a nonparticipating manufacturer that:
- 31 (A) has filed a certification under section 13 of this
- 32 chapter; and
- 33 (B) poses an elevated risk for noncompliance, as
- 34 determined by the attorney general under subsection (a);
- 35 to post a bond as described in subsection (c).
- 36 (c) A bond required under subsection (b) must be:
- 37 (1) posted by corporate surety located within the United
- 38 States;
- 39 (2) in an amount equal to the greater of:
- 40 (A) fifty thousand dollars (\$50,000); or
- 41 (B) the amount that the nonparticipating manufacturer is
- 42 required to place into a qualified escrow fund under

C
O
P
Y



1 **IC 24-3-3-12(2) for the calendar year in which the bond is**
 2 **posted;**
 3 **(3) written in favor of the state of Indiana; and**
 4 **(4) for a nonparticipating manufacturer, conditioned on the**
 5 **performance of the nonparticipating manufacturer, or an**
 6 **importer that assumes joint and several liability with the**
 7 **nonparticipating manufacturer under section 13.5 of this**
 8 **chapter, of all obligations and duties of the nonparticipating**
 9 **manufacturer under this article during the calendar year in**
 10 **which the bond is posted and the immediately succeeding**
 11 **calendar year.**

12 **(d) If the attorney general determines under subsection (a) that**
 13 **a newly qualified nonparticipating manufacturer poses an elevated**
 14 **risk of noncompliance, the attorney general may require the newly**
 15 **qualified nonparticipating manufacturer to post a bond under**
 16 **subsection (c) for at least the first three (3) years during which the**
 17 **newly qualified nonparticipating manufacturers brand families are**
 18 **listed in a directory under section 14 of this chapter.**

19 **SECTION 6. IC 24-3-5.4-14, AS AMENDED BY P.L.177-2005,**
 20 **SECTION 44, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE**
 21 **JULY 1, 2010]: Sec. 14. (a) Not later than July 1 of each year, the**
 22 **attorney general shall make available to the public by publishing on**
 23 **accessIndiana (as operated under IC 4-13.1-2) a directory listing all**
 24 **brand families listed in certifications filed under section 13 of this**
 25 **chapter.**

26 **(b) A directory described in subsection (a) shall not include the**
 27 **name or brand families of a nonparticipating manufacturer:**

28 **(1) that fails to comply with section 13 of this chapter; or**
 29 **(2) whose certification fails to comply with section 13(c) or 13(e)**
 30 **of this chapter, unless the attorney general determines that the**
 31 **failure has been remedied; or**

32 **(3) that:**

33 **(A) has filed a certification under section 13 of this**
 34 **chapter; and**

35 **(B) poses an elevated risk for noncompliance, as**
 36 **determined by the attorney general under section 13.6(a)**
 37 **of this chapter;**

38 **unless the nonparticipating manufacturer, or an importer that**
 39 **assumes joint and several liability with the nonparticipating**
 40 **manufacturer under section 13.5 of this chapter, posts a bond**
 41 **under section 13.6 of this chapter.**

42 **(c) The directory may not include a tobacco product manufacturer**

C
O
P
Y



or a brand family if the attorney general concludes that:

(1) in the case of a nonparticipating manufacturer, all escrow payments required under IC 24-3-3-12 for any period for any brand family, whether or not listed by the nonparticipating manufacturer, have not been fully paid into a qualified escrow fund governed by a qualified escrow agreement that has been approved by the attorney general; or

(2) all outstanding final judgments, including interest on the judgments, for violations of IC 24-3-3 have not been fully satisfied for the tobacco product manufacturer or brand family.

(d) The directory may not include a newly qualified nonparticipating manufacturer unless the newly qualified nonparticipating manufacturer posts a bond under section 13.6 of this chapter.

~~(d)~~ (e) The attorney general shall update the directory as necessary to correct mistakes or to add or remove a tobacco product manufacturer or brand family to keep the directory in conformity with the requirements of this chapter.

~~(e)~~ (f) The attorney general shall post in the directory and transmit by electronic mail or other means to each distributor or stamping agent notice of any removal from the directory of a tobacco product manufacturer or brand family not later than thirty (30) days before the attorney general removes the tobacco product manufacturer or brand family from the directory.

~~(f)~~ (g) Unless otherwise provided in an agreement between a tobacco product manufacturer and a distributor or stamping agent, a distributor or stamping agent is entitled to a refund from a tobacco product manufacturer for any money paid by the distributor or stamping agent to the tobacco product manufacturer for any cigarettes of the tobacco product manufacturer or brand family that:

(1) are in the possession of the distributor or stamping agent on;
or

(2) the distributor or stamping agent receives from a retailer after; the date on which the tobacco product manufacturer or brand family is removed from the directory.

~~(g)~~ (h) Unless otherwise provided in an agreement between a retailer and a distributor, stamping agent, or tobacco product manufacturer, a retailer is entitled to a refund from a distributor, stamping agent, or tobacco product manufacturer for any money paid by the retailer to the distributor, stamping agent, or tobacco product manufacturer for any cigarettes of the tobacco product manufacturer or brand family that are in the possession of the retailer on the date on

C
o
p
y



1 which the tobacco product manufacturer or brand family is removed
2 from the directory.

3 ~~(h)~~ (i) The attorney general shall not restore a tobacco product
4 manufacturer or brand family to the directory until the tobacco product
5 manufacturer pays a distributor, stamping agent, or retailer any refund
6 due under subsection ~~(f)~~ (g) or ~~(g)~~ (h).

7 ~~(i)~~ (j) A distributor or stamping agent shall provide and update as
8 necessary an electronic mail address to the attorney general for
9 purposes of receiving a notification required by this chapter.

C
o
p
y

